90-1907

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

DELUXE SHEET METAL, INC.;
HERRMAN & GOETZ, INC.,

Petitioners,

v.

PLYMOUTH PLASTICS, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, and under what circumstances, a debtor's bankruptcy stay prevents actions by its creditors against non-debtors.

Whether the automatic stay in a general contractor's bankruptcy applies to prevent enforcement of subcontractor's mechanic's liens against a non-debtor owner when the general contractor had initiated a bankruptcy adversary proceeding claiming funds due from the owner and challenging the perfection of the subcontractors' liens.

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SPECIAL NOTE ON CITATIONS TO RECORD

Because these are consolidated appeals, there are records from two trial court proceedings. In this brief, the record in the case of Deluxe Sheet Metal, Inc. v. Plymouth Plastics, Inc., will be cited as D.R. The record in the case of Herrman & Goetz, Inc. v. Plymouth Plastics, Inc., will be cited as H&G R.

OPINIONS BELOW

In Cause Numbered 50A03-CV-00430 the Supreme Court of Indiana denied transfer of this case from the Court of Appeals of Indiana thus leaving that decision stand. The Court of Appeals decision is found at 555 N.E.2d 1296 (1990). The denial of transfer by the Supreme Court constitutes a final judgment or action by that court. Ind. Rules of Appellate Proc. 11(4) and (8).

JURISDICTION

The Indiana Supreme Court denied transfer of this case on the 20th day of March, 1991, thus leaving the decision of the Indiana Court of Appeals stand. The Court of Appeals decision affirmed the trial court's holding that the automatic stay provisions of Sec. 362 of the Bankruptcy Code of 1978 (11 U.S.C. 362) did not stay the filing of a mechanic's lien foreclosure action by subcontractors against an owner where the general contractor had become a debtor in bankruptcy. 28 U.S.C. 1257(a) provides jurisdiction in the United States Supreme Court to review federal questions – here the valid application of 11 U.S.C. 362.

STATUTES INVOLVED

11 U.S.C. Sec. 362 provides, in pertinent part:

Sec. 362. **Automatic stay.**

(A) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of

this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay –

(1) * * *

(2) * * *

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

Ind. Code 32-8-3-3 **Notice of intention to hold lien; filing**

Sec. 3. (a) Any person who wishes to acquire a lien upon any property, whether the claim is due or not, shall file in the recorder's office of the county at any time within sixty (60) days after performing labor or furnishing material or machinery described in section 1 of this chapter, a sworn statement in duplicate of the person's intention to hold a lien upon the property for the amount of the claim. The statement must specifically set forth:

(1) the amount claimed;

(2) the name and address of the claimant and the name of the owner;

(3) the latest address of the owner as shown on the property tax records of the county; and

(4) the legal description, street and number, if any, of the lot or land on which the house, mill, manufactory or other buildings, bridge, reservoir, system of water-works or other structure may stand or be connected with or to which it may be removed.

The name of the owner and legal description of the lot or land will be sufficient if they are substantially as set forth in the latest entry in the county auditor's transfer books at the time of filing of the notice of intention to hold a lien. The recorder shall mail first class one (1) of the duplicates to the owner named in the notice within three (3) business days after recordation and post records as to the date of this action. The notice shall be addressed to the latest address of the owner as specifically set out in the sworn statement of the person intending to hold a lien upon the property. The recorder shall be entitled to a fee of two dollars ($2) to be collected from the lien claimant for each notice that is mailed.

(b) Notwithstanding IC 32-1-10, the statement required by subsection (a) may be verified and filed on behalf of a client by an attorney registered with the clerk of the supreme court as an attorney in good standing under the requirements of the supreme court. As amended by Acts 1981, P.L.269, Sec.1; P.L.182-1986, Sec.1; P.L.231-1989, Sec.4; P.L.45-1990, Sec.4.

Ind. Code 32-8-3-5 **Recording notice; priority of lien**

Sec. 5. The recorder shall record the notice, when presented, in the miscellaneous record book, for which

the recorder shall charge a fee in accordance with IC 36-2-7-10. All liens so created shall relate to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery, and shall have priority over all liens suffered or created thereafter, except the liens of other mechanics and materialmen, as to which there shall be no priority. As amended by P.L.231-1989, Sec.5.

Ind. Code 32-8-3-6 **Enforcement of lien**

Sec. 6. Any person having such lien may enforce the same by filing his complaint in the circuit of superior court of the county where the real estate or property on which the lien is so taken is situated, at any time within one (1) year from the time when said notice has been received for record by the recorder of the county; or, if a credit be given, from the expiration of the credit, and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void: Provided, That no credit shall be valid to extend the time for filing suit hereunder unless the terms thereof are in writing executed by the lienholder and by all owners of record, and recorded in the same manner as the original notice of lien and within one (1) year from the date the notice of lien was originally received for record. If said lien be foreclosed as herein provided, the court rendering judgment shall order the sale to be made, and the officers making the sale shall sell the property, without relief whatever from valuation or appraisement laws.

STATEMENT OF THE CASE

A. FACTS

Plymouth Plastics, Inc. decided to build a plant on real estate it owns in Marshall County, Indiana; it hired Wright Construction Company as general contractor for the job. (D.R. 288; H&G R. 366). As general contractor, Wright Construction Company hired Herrman & Goetz, Inc., and Deluxe Sheet Metal, Inc., to perform work on the project as subcontractors. (D.R. 100-101; H&G R. 122-123). Each completed its work on the project but was not paid; the value of their work was $79,600.00 and $57,662.00, respectively. (*id.*)

Wright Construction Company, the general contractor, filed for relief under Chapter 11 of the Bankruptcy Code on May 9, 1986. (D.R. 101; H&G R. 124-125). Herrman & Goetz, Inc. and Deluxe Sheet Metal, Inc. filed their notices of intention to hold mechanic's liens in accordance with Indiana law on May 13, 1986. (D.R. 121-122; H&G R. 142-143).

On June 25, 1986, Wright Construction Company filed an adversary proceeding in bankruptcy court naming as Defendants all parties to this appeal. (D.R. 101-102; H&G R. 124). Wright Construction Company asked the bankruptcy court to set aside the mechanic's liens of Herrman & Goetz, Inc. because they were not perfected in the time frame required by Indiana law. (D.R. 124-128; H&G R. 144-148). Wright Construction Company also sought turnover of approximately $57,000.00 for labor and material performed and furnished on the project. (*id.*) The bankruptcy court dismissed the adversary proceeding on June 22, 1987, after considering a stipulation of

dismissal entered by the parties. (D.R. 102, 149; H&G R. 124, 169).

The following day, June 23, 1987, Appellants filed state court complaints to enforce their perfected mechanic's liens. (D.R. 4-10; H&G R. 4-11). Plymouth Plastics, Inc. moved to dismiss the complaints because of its claim that the foreclosure actions were not timely filed under Indiana law. (D.R. 103; H&G R. 125). Herrman & Goetz, Inc. and Deluxe Sheet Metal, Inc. responded that the automatic stay from Wright Construction Company bankruptcy had barred the filing, and that the state statute of limitations was tolled by 11 U.S.C. Sec. 108(c). The state trial court denied the motion to dismiss in each case. (D.R. 13; H&G R. 18). Trial was held in both cases on March 28, 1989. The trial court entered substantially similar judgments on September 5, 1989, finding that suits on the perfected liens were not timely filed and thus void and that the automatic stay did not prevent their enforcement. (App. 10, 15). Appellants argued, as they had previously in response to the Motion to Dismiss, that the state law one-year time limit for enforcing their mechanic's liens was tolled by the automatic stay from the debtor-contractor's bankruptcy in general, and particularly because of the specific claims made in the adversary proceeding. The Indiana Court of Appeals held that the automatic stay provisions of 11 U.S.C. 362(a)(1), (3) and (6) did not bar the subcontractors from foreclosing their liens against the property owner, notwithstanding the fact that their contracts were only with the debtor and they had no personal right of action against the owner, only an in rem action designed to secure payment from the debtor-contractor. (App. 2-12). The Indiana Supreme

Court let that ruling stand on March 20, 1991, when it denied Appellants' Petition to Transfer. (App. 1).

B. THE INDIANA STATUTORY BACKGROUND

The Indiana Mechanic's Lien Law is codified at Ind. Code 32-8-3-1 et seq. Perfection of the lien is accomplished by complying with Ind. Code 32-8-3-3. *Leeper v. Myers*, 10 Ind. App. 314, 37 N.E. 1070 (1894). Enforcement of a perfected lien by filing foreclosure must occur within one year of its filing. Ind. Code 32-8-3-6. In Indiana, the general contractor need not be a party to the foreclosure action. 19 I.L.E. *Mechanics' Liens* Sec. 95 (1959); *see, also, Hubbard et al. v. Moore* (1892), 132 Ind. 178, 31 N.E. 534. Filing a mechanic's lien does not confer upon the subcontractor a personal claim against the owner, only an in rem claim against the improved parcel of land. Ind. Code 32-8-3-3, 32-8-3-9. Once perfected by filing, the lien relates back to the date on which the lienholder commenced his work. Ind. Code 32-8-3-5. The doctrine of relation back is critical because it is this feature which triggers the exception to the automatic stay which allowed Deluxe Sheet Metal, Inc. and Herrman & Goetz, Inc. to perfect their mechanic's liens after Wright Construction Company had filed bankruptcy. *See* 11 U.S.C. Sec. 362(b)(3) and 11 U.S.C. Sec. 546(b); App. 5, n. 2. In this regard, Indiana's Mechanic's Lien Law is similar to those of most other states.[1]

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[1] Other states in which mechanic's liens relate back to date earlier than filing date: Ala. Code Sec. 35-11-201 et seq. (1975); Alaska Stat. Sec. 34.35.050 et seq.; Ariz. Rev. Stat. Ann. Sec.

(Continued on following page)

C. PRIOR PROCEEDINGS IN THE INDIANA COURTS

The day after Wright Construction Company's adversary proceeding was dismissed, Herrman & Goetz, Inc. and Deluxe Sheet Metal, Inc. filed foreclosure actions in the Circuit Court for Marshall County, Indiana, the venue prescribed by Ind. Code 32-8-3-6. Wright Construction Company moved to dismiss the actions because they had not been filed within one year of the recording of the Notices of Intention to Hold Lien.[2] The trial court denied

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33-981 et seq.; Colo. Rev. Stat. Sec. 38-22-101 et seq.; Del. Code Ann. title 25, Sec. 2701 et seq.; Ga. Code Ann. Sec. 67-2001 et seq.; Hawaii Rev. Stat. Sec. 507, part II; Idaho Code Sec. 45-501 et seq.; Ill. Ann. Stat. ch. 82 par. 1 et seq. (Smith-Hurd); Iowa Code Ann. Sec. 572-1 et seq. (West); Kan. Stat. Ann. Sec. 58-201 et seq.; La. Rev. Stat. Ann. Sec. 9:2781 et seq.; Me. Rev. Stat. Ann. tit. 10, Sec. 325 et seq.; Md. Real Property Code Ann. Sec. 9-101 et seq.; Minn. Stat. Ann. Sec. 14.01 et seq.; Mo. Ann. Stat. Sec. 429.010 et seq. (Vernon); Neb. Rev. Stat. Sec. 52-401 et seq.; N.M. Stat. Ann. Sec. 48-2-1 et seq.; N.Y. Line Law Sec. 1 et seq. (McKinney); Ohio Rev. Code Ann. Sec. 1311 et seq.; Okla. Stat. tit. 42, Sec. 141 et seq.; Or. Rev. Stat. Sec. 87.010 et seq.; Pa. Cons. Stat. Sec. 49-1101 et seq.; R.I. Gen. Laws Sec. 34-28-1 et seq.; S.C. Code Ann. 29-5-10 et seq.; S.D. Codified Laws Ann. Sec. 44-9-1 et seq.; Tenn. Code Ann. Sec. 66-1101 et seq.; Tex. Prop. Code 53.052 et seq.; Utah Code Ann. 14-2-1 et seq. (1953); Va. Code 43-1 et seq.; W.Va. Code Sec. 38-2-1 et seq.; Wis. Stat. Ann. Sec. 779.01 et seq. (West); Wyo. Stat. Sec. 29-2-101 et seq.

[2] The Notices of Lien were filed May 13, 1986; the Foreclosure actions were filed June 23, 1987.

the motion to dismiss. After trial, the court found that the automatic stay was not applicable to a subcontractor's foreclosure against a non-debtor owner and thus 11 U.S.C. Sec. 108(c) did not apply to toll the one-year limitation imposed by Ind. Code 32-8-3-6 (App. 12, 15). This finding was upheld by the Indiana Court of Appeals in its reported decision, which was left to stand by the Indiana Supreme Court's refusal to hear the case.

ARGUMENT

I. WHETHER, AND UNDER WHAT CIRCUMSTANCES, A DEBTOR'S BANKRUPTCY STAY PREVENTS ACTIONS BY CREDITORS AGAINST NON-DEBTORS IS AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Proper interpretation of the automatic stay (11 U.S.C. Sec. 362) is essential in virtually all construction cases where a general contractor, subcontractor or owner files bankruptcy. The Indiana decision in this case conflicts with the decisions of four federal Circuit Courts of Appeal and the Illinois Supreme Court. The Indiana courts took a narrow view of the scope of the automatic stay, an isolated, parochial view in comparison to the broad scope intended by Congress and characterized by the following decisions: *Valley Transit Mix of Ruidoso, Inc. v. Miller,* 928 F.2d 354 (10th Cir. 1991); *Garbe Iron Works v. Priester,* 99 Ill. 2d 84, 76 Ill. Dec. 428, 457 N.E.2d 422 (1983); *In re Hunter's Rur Limited Partnership,* 875 F.2d 1425 (9th Cir. 1989); *In re 48th St. Steakhouse, Inc.,* 835 F.2d 427 (2nd Cir. 1987), *cert. denied* 485 U.S. 1035, 108 S.Ct. 1596, 99 L.Ed.2d 910; *A.H. Robbins Co., Inc. v. Piccinin,* 788

F.2d 994 (4th Cir. 1986). This case presents a striking example of the dilemma created by the conflict between state and federal law, and the perplexing problems it creates for mechanic's lienholders and their attorneys seeking simultaneously to comply with the automatic stay, thus avoiding its contempt sanctions, and to satisfy state statutes of limitation on the enforcement of their mechanic's liens. The Indiana decision fails to recognize the broad application of the automatic stay and the supremacy of federal law. Federal bankruptcy law universally indicates that the stay allows post-petition perfection of mechanic's liens under statutes similar to the Indiana law, but bars any litigation to enforce the lien. The Indiana decision held that the stay provisions did not apply and that foreclosure of the lien should have been filed notwithstanding the bankruptcy proceedings. (App. 2-12).

Should the Indiana decision stand, in all states with mechanic's lien laws similar to Indiana, subcontractors and their attorneys will continue to face the perplexing problem of whether to file foreclosure and face contempt for violation of the automatic stay or withhold the foreclosure filing until the stay is no longer effective and risk losing the lien by operation of the state statute of limitation on enforcement of a perfected mechanic's lien.

This dilemma, and the resulting split of authority between the Indiana decision and the opinions in *Valley Transit Mix of Ruidoso, Inc. v. Miller, supra,* and *Garbe Iron Works v. Priester, supra,* merit an interpretation of the automatic stay by the U.S. Supreme Court to serve as a guide to courts throughout the nation. The number of recent decisions on the scope of the stay, and the exception to it in 362(b)(3), indicates that the problem is being encountered with ever

increasing frequency in the federal and state courts of the many states which have mechanic's lien laws similar to Indiana. Whether, and under what circumstances, a debtor's bankruptcy stay prevents actions by its creditors against non-debtor third parties is a significant issue of law which arises in a number of contexts (*see, e.g., infra* pp. 16-17).

Throughout this case, Herrman & Goetz, Inc. and Deluxe Sheet Metal, Inc. have argued that the stay applied because filing to foreclose the mechanic's lien against the property owner, Plymouth Plastics, Inc. (1) would violate 362(a)(1) and (6) as an act to collect their claims against the debtor/general contractor, Wright Construction Company, the only party with whom they had contracted; and (2) would have violated 362(a)(3) and (4) because of the effect on the debtor's estate which would result from the owner's payment in satisfaction of the lien (giving owner either a claim or right of setoff against the debtor), particularly when the debtor had summoned the owner and lienholders into bankruptcy court challenging perfection of the subcontractor's liens and seeking contract receivables from the owner.

II. THE INDIANA DECISION IS IN CONFLICT WITH DECISIONS OF SEVERAL CIRCUIT COURTS OF APPEAL AND A STATE COURT OF LAST RESORT.

A. THE INDIANA DECISION THAT THE STAY IS NOT VIOLATED BY FORECLOSURE AGAINST A NON-DEBTOR IS CONTRARY TO A RECENT RULING OF THE TENTH CIRCUIT COURT OF APPEALS WHICH WAS UNAVAILABLE TO THE INDIANA COURTS.

The Indiana decision articulated the issue presented in this case as "whether the automatic stay provision of

the Bankruptcy Code, 11 U.S.C. Sec. 362(a), prevented Appellants from enforcing their mechanic's liens against the Appellee-non-debtor owner". (App. 3). Appellants argued that enforcement of their mechanic's liens would violate 11 U.S.C. Sec. 362(a)(1) and (6), because their claims against the owner are derivative of their claims against the general contractor.

The Indiana decision held that because Wright Construction Company "was not a necessary party to the foreclosure action, the Appellants would not have violated the automatic stay by commencing their action (sic) to enforce their liens and therefore, the [state statute of limitations] was not tolled". (App. 7). This decision erroneously held that neither 11 U.S.C. Sec. 362(a)(1) nor 11 U.S.C. Sec. 362(a)(6) barred the action. The Indiana decision is directly and irreconcilably contrary to *Valley Transit Mix, Inc. v. Miller,* 928 F.2d 354 (10th Cir. 1991).[3]

B.C.R., the mechanic's lienholder, in *Valley Transit Mix* made the same argument as the lienholders in this case. B.C.R. sued a non-debtor owner who leased its land to Ruidoso, the party with whom B.C.R. had contracted to do its work. B.C.R.'s contractual claim was against Ruidoso, and its mechanic's lien rights were derivative of that claim. Judge Brobry wrote for the Tenth Circuit:

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[3] Because this case was decided on March 19, 1991, it was not available for the Indiana Supreme Court, which decided March 20, 1991, to let the Appellate Court decision stand.

> B.C.R. contends that even though it was seeking to satisfy a debt out of property that stood in the name of persons other than a debtor, Section 362 makes no such distinction but, instead, bars any action to collect or recover a claim against a debtor from any source whatsoever, not just a debtor. Therefore, according to B.C.R. it was stayed from filing its foreclosure claim and protected by Section 108(c)(2).
>
> We agree with B.C.R.'s position. The stay provisions of Sec. 362 are broad. The stay protects not only property of the estate but also prohibits 'any act to collect . . . or recover a claim against the debtor . . . ' *See* U.S.C. Sec. 362(a)(6). . . . Here B.C.R.'s foreclosure claim was based upon a debt incurred by Ruidoso. Therefore, B.C.R.'s foreclosure claim was stayed by Section 362, and the tolling provisions of 108(c) applied to the claim.

Valley Transit Mix appropriately looks at the origin of the obligation as the key to the application of the stay. Examining the origin of the obligation in the case at bar reveals that it is identical to the obligation in *Valley Transit Mix*. In this case, the subcontractors have a contractual claim against the debtor general contractor. They have no rights against the owner's property until they perfect by filing their notices of mechanic's liens. While this is obviously an attempt to recover their claims against the debtor, it is expressly allowed by the exception to the automatic stay codified in 11 U.S.C. Sec. 362(b)(3). That exception allows only the perfection of the lien, and prohibits any enforcement. In fact, in those states where litigation is required to perfect the

mechanic's lien, the code preempts state law and says filing notice only shall be sufficient. *See* 11 U.S.C. Sec. 362(b)(3); 11 U.S.C. Sec. 546(b). The Indiana decision illogically and erroneously holds that enforcement of the lien does not violate the stay even though the lien could be perfected only as a result of the exception to the automatic stay.

The reasoning of *Valley Transit Mix* also shows the flaw in the logic the Indiana decision employed in distinguishing *Garbe Iron Works v. Priester*, 99 Ill. 2d 84, 76 Ill. Dec. 428, 457 N.E.2d 422 (1983).

Garbe presented a factual situation which was similar to that here. Garbe Iron Works was a subcontractor for National Precast, Inc., in certain construction work contracted for between National Precast as general contractor and property owners George I. and Veta L. Priester. National Precast filed bankruptcy on August 11, 1979 just over three months after Garbe had perfected its mechanic's lien, and more than 6 months after Garbe completed its work on February 2, 1979. On December 23, 1980, the Bankruptcy Court modified the stay to permit Garbe to file and pursue its mortgage foreclosure. Garbe filed its foreclosure action on March 16, 1981. Illinois law requires the foreclosure suit to be filed within two years of completion of work under the contract. Priester defended on the basis of the statute of limitations but the Illinois Court ruled that the automatic stay barred the foreclosure, and 108(c) served to toll the running of the statute. *Garbe* was distinguished in the Indiana decision because the general contractor is an essential party to the suit under Illinois law. (App. 6). This factor accounts only for the first clause of 11 U.S.C. Sec. 362(a)(1), not to that

subsection's second clause nor to the even broader language of 362(a)(6). Under the reasoning of *Valley Transit Mix*, the decision in *Garbe* would have been the same whether or not the general contractor was a necessary party for the suit. This result is in accord with all rulings of federal courts which have been uncovered by counsel. *See, In re Hunter's Run Limited Partnership*, 875 F.2d 1425 (9th Cir. 1989); *In re A.P.C. Construction, Inc.*, 112 B.R. 89 (Bankr. D.Vt. 1990); *Matter of Fiorillo*, 19 B.R. 21 (Bankr. S.D.N.Y. 1982); *In Re Houts*, 23 B.R. 705 (Bankr. M.D.Mo. 1982); *In re Nash Phillips/Copus, Inc.*, 78 B.R. 798 (W.D. Tex. 1987); *See, also, In re Tull and Sons, Inc.*, 25 B.R. 709 (Bkrtcy. D.Md. 1982); *In re Birdview Satellite Communications*, 90 B.R. 465 (Bkrtcy. Kan. 1988); *Yobe Electric, Inc. v. Graybar Electric Co.*, 30 B.R. 114 (Bkrtcy. Pa. 1983).

B. THE INDIANA COURT'S INTERPRETATION OF APPLICATION OF THE AUTOMATIC STAY TO ACTIONS INVOLVING NON-DEBTORS IS CONTRARY TO RULINGS OF THE SECOND AND FOURTH CIRCUIT COURTS OF APPEAL.

The exception to the general rule that Sec. 362(a)(1) only bars actions against the debtor, is characterized by an unusual relationship resulting in intertwined interests of the non-debtor party and the creditor. If the interests of the interests of the non-debtor party and the debtor are intertwined, the automatic stay will prevent any action against the non-debtor which would inevitably have an adverse impact on the property of the bankrupt estate. *In re 48th St. Steakhouse, Inc.*, 835 F.2d 427 at 431 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1035, 108 S.Ct. 1596, 99

L.Ed.2d 910. Under this theory, the stay has been held to bar a landlord's cancellation of the lease of a non-debtor prime tenant whose subtenant is bankrupt, *id.*; creditor's action against non-debtor guarantor of bankrupt principal, *A.H. Robbins v. Piccinin*, 784 F.2d 994 at 999 (4th Cir. 1986), *In re Metal Center, Inc.*, 31 B.R. 458 (D.Conn. 1983); creditor's action to appoint receiver in foreclosure action against non-debtor owner who had hired bankrupt building manager, *Matter of Colonial Realty Corp.*, 122 B.R. 1 (Bkrtcy. D.Conn. 1990); creditor's action to collect from individual controlling bankrupt corporation, where individual entitled to indemnification for actions, *In re North Star Contracting Corp.*, 125 B.R. 368 (S.D.N.Y. 1991).

The results of these cases are entirely consistent with the decisions on application of the stay to tripartite mechanic's liens situations such as those presented by *Valley Transit Mix, supra,* and *A.P.C. Construction, supra.* The intertwining of interests is obvious; it results from the derivative nature of the subcontractor's claim against the owner and the owner's right either to indemnification from the general contractor if he has to pay twice for the same work in order to satisfy a mechanic's lien or to setoff against any amount which owner still owes the debtor/general contractor. Either action would affect the amount of money available in the bankruptcy estate for the general contractor's creditors.

The subcontractors in this case had no personal action against the property owner; their liens against the owner's property secured payment by the owner's chosen general contractor of its obligations to subcontractors.

If the general contractor pays the subcontractor, the subcontractor has no right to hold a mechanic's lien. Thus, the lien claims of the subcontractor against the owner's property must be derivative of their claims against the general contractor.

Where the owner still owes the debtor their interests are intertwined because the owner has a right of setoff. The debtor in this case claimed that the owner had not made all payments required under their contract (a claim the debtor abandoned after the state statute had run). Under Indiana law, if the owner makes payment on a mechanic's lien, it may set off any amount so paid or, if it has paid all sums due, may seek indemnification from the general contractor. *Bird v. Rector, etc. of St. John's Episcopal Church of Elkhart*, 154 Ind. 138, 56 N.E. 129 (1900). Because the general contractor is bankrupt, the automatic stay would bar actions against the owner who may either set off sums due or seek indemnification from the debtor/general contractor. *See, A.H. Robbins v. Piccinin, supra; In re North Star Contracting Corp., supra.*

The application of the stay was even more clear in this case because the debtor filed an adversary proceeding seeking turnover of the receivable from the owner, and also sought an order setting aside the mechanic's liens because the debtor claimed they were not properly perfected. Against this scenario, the reasoning of the previous cases is fortified by the additional policy consideration of judicial economy. The importance of consistent, controlling decisions compels the parties to resolve the bankruptcy case first. Then, if appropriate, the state court should entertain any unresolved issues of state law. *See,*

e.g., Seybolt v. Bio-Energy of Lincoln, Inc., 38 B.R. 123 at 127-128 (D.Mass. 1984).

CONCLUSION

The Indiana Courts improperly concluded that the automatic stay of 11 U.S.C. Sec. 362 does not apply to a mechanic's lien foreclosure action by a subcontractor against an owner whose general contractor is a debtor in bankruptcy. Therefore, your petitioners respectfully petition this Court to issue a Writ of Certiorari to review the Indiana decision of March 20, 1991.

Respectfully submitted,

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Counsel for Petitioners

June 12, 1991

APPENDIX

IN THE INDIANA SUPREME COURT

CAUSE NO. 50A03-8910-CV430

DELUXE SHEET METAL, INC.)
HERRMAN & GOETZ, INC.)
)
Appellants,)
)
v.)
)
PLYMOUTH PLASTICS, INC.)
)
Appellee.)

ORDER OF INDIANA SUPREME COURT

Appellant's Petition to Transfer is hereby denied. Randall T. Shephard, Chief Justice. All Justices concur. Witness my name and the seal of said Court, this 20th day of March, 1991.

/s/ Dwayne Brown
Clerk, Supreme Court

IN THE COURT OF APPEALS OF
INDIANA THIRD DISTRICT

DELUXE SHEET METAL, INC. and HERRMAN & GOETZ, INC.,	)	
Plaintiffs-Appellants	)	No. 50A03-8910-CV-430
v.	)	
PLYMOUTH PLASTICS, INC.,	)	
Defendant-Appellee	)	

APPEAL FROM THE MARSHALL CIRCUIT COURT

The Honorable Michael D. Cook, Judge
Cause Nos. 50C01-8706-CP-138 and 50C01-8706-CP-137

HOFFMAN, P.J.

Plaintiffs-appellants Deluxe Sheet Metal, Inc. and Herrman & Goetz, Inc. appeal the trial court's judgment in favor of Plymouth Plastics, Inc.

The facts relevant to this appeal disclose that defendant-appellee Plymouth Plastics owns a parcel of real estate in Marshall County, Indiana. Plymouth Plastics contracted with Wright Construction Company to build a plant on the real estate. As general contractor, Wright Construction contracted with Herrman & Goetz, Inc. and Deluxe Sheet Metal, Inc. to perform work on the project as subcontractors. Herrman & Goetz and Deluxe completed work on the project for which they were not paid. The claimed value of this work is $79,600.00 and $57,662.00 respectively.

The contractor, Wright Construction, filed for relief under Chapter 11 of the Bankruptcy Code on May 9, 1986.

Herrman & Goetz and Deluxe filed notices of mechanic's liens on May 13, 1986.

On June 25, 1986, Wright Construction filed an adversary proceeding in bankruptcy court naming Herrman & Goetz, Deluxe, and Plymouth Plastics as defendants. Wright asked the court to set aside the mechanic's liens of Herrman & Goetz and Deluxe because they were not timely filed under IND. CODE § 32-8-3-1 (1988 Ed.). It also requested the court to order Plymouth Plastics to turn over approximately $57,000.00 for labor and material performed and furnished on the project. The bankruptcy court dismissed the adversary proceeding on June 22, 1987 after considering a stipulation of dismissal entered into by the parties.

Herrman & Goetz and Deluxe filed their complaints to foreclose mechanic's liens on June 23, 1987. These causes came to trial on March 28, 1989. The court entered its judgment on September 5, 1989 finding that Herrman & Goetz and Deluxe complied with the time requirements for *filing* mechanic's liens but did not timely file their complaints to foreclose mechanic's liens to *enforce* their liens.

One issue is dispositive of this appeal: whether the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362(a), prevented appellants from enforcing their mechanic's liens against the appellee-nondebtor owner.[1]

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[1] None of the parties to the this appeal dispute the trial court's finding that plaintiffs-appellants timely filed their mechanic's liens pursuant to IND. CODE § 32-8-3-3 (1988 Ed.). (This section requires a party to file a notice of intention to hold a lien upon property within 60 days after performing such labor or furnishing such materials or machinery.)

Since the trial court found that the claimants failed to meet all statutory requirements for enforcing their liens, the lien claimants are appealing negative judgments. A negative judgment will be reversed only if it is contrary to law. *Stanray Corp. v. Horizon Constr., et al.* (1976), 168 Ind.App. 164, 175-176, 342 N.E.2d 645, 652.

> "And '[i]t is only where the evidence is without conflict and can lead to but one conclusion, and the trial court has reached an opposite conclusion, that the decision of the trial court will be set aside on the ground that it is contrary to law.' *Lamb v. Conder*, (1975), 166 Ind.App. 293, 335 N.E.2d 625, 628."
>
> *Id.*

Initially there is a question raised in the briefs of whether the mechanic's lien statutes should be liberally or strictly construed. In Indiana the mechanic's lien statutes are in derogation of the common law and the provisions of the statutes which relate to the creation, existence, or class of individuals entitled to such a lien are to be strictly construed. *Edwards v. Bethlehem Steel Corp.*, (1988), Ind.App., 517 N.E.2d 430, 432. However, once the lien has attached, provisions relating to the enforcement should be liberally construed to effect the remedial purposes of the statute. *Id.*

The parties also raise a preliminary question as to when a mechanic's lien is deemed perfected. In Indiana there is a distinction between perfecting a lien and enforcing a lien. Once the claimant has met the requirement of IND. CODE § 32-8-3-3 for filing a mechanic's

lien, the lien is deemed perfected.[2] *Leeper v. Myers* (1894), 10 Ind.App. 314, 37 N.E. 1070. The claimant then has one year in which to enforce his perfected lien. IND. CODE § 32-8-3-6 (1988 Ed.).

Since it is not disputed that appellants properly filed their mechanic's liens pursuant to IND. CODE § 32-8-3-3, the issue is whether the liens were enforced within the one-year period. As stated above the statute relating to the enforcement of the liens will be liberally construed. This statute reads:

> "Any person having *such lien may enforce the same by filing his complaint* in the circuit or supreme court of the county where the real estate or property on which the lien is so taken is situated, at any time *within one (1) year from the time when said notice had been received for record by the recorder of the county*; or, if a credit be given, from the expiration of the credit, *and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void*: Provided, That no credit shall be valid to extend the time for filing suit hereunder unless the terms thereof are in writing executed by the lien holder and by all owners of record, and recorded in the same manner as the original notice of lien and within one (1) year from the date the notice of lien was originally received for record. If said lien be foreclosed as herein provided, the court rendering judgment shall

---

[2] Although there was some discussion as to whether the automatic stay prevents the perfection of a mechanic's lien, it is clear that perfection of a mechanic's lien is excepted from the scope of the automatic stay. *See*: 11 U.S.C. § 362(b)(3) and 11 U.S.C. § 546(b).

> order the sale to be made, and the officers making the sale shall sell the property, without relief whatever from valuation or appraisement laws." (Emphasis added.)

IND. CODE § 32-8-3-6 (1988 Ed.).

Appellants claim the one-year period in which to enforce the liens was tolled due to the debtor contractor's bankruptcy petition triggering the automatic stay provision. 11 U.S.C. § 362(a). The contractor's petition operated

> "as a stay, applicable to all entities, of –
>
> (1) the commencement . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> * * *
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]"

11 U.S.C. § 362(a) (1990 Ed.).

Appellants argue that while their foreclosure was not directly against the debtor-contractor, the debtor-contractor was necessarily involved since the mechanic's liens against the owner's real estate could not have existed without a claim against the debtor-contractor. Therefore,

appellants believe the foreclosure action would have violated the automatic stay prohibiting recovery of a claim against the debtor.

The supreme court in Illinois addressed this issue in *Garbe Iron Works, Inc. v. Priester* (1983), Ill., 457 N.E.2d 422. The subcontractor in *Garbe* was not paid for its work by the contractor who had gone into bankruptcy. Hence, the subcontractor had filed a mechanic's lien against the owner's real estate. The subcontractor argued that it could not have brought an action to enforce its lien until the automatic stay had been lifted and therefore, the time period in which to enforce a lien should be tolled. The court looked to § 108(c) of the Bankruptcy Act for guidance. It provides:

> "[I]f applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title. . . . "
>
> 11 U.S.C. § 108(c) (1990 Ed.).

Relying on § 108(c)(1), the court held that since the subcontractor was precluded from filing suit for 133 days on account of the automatic stay, the subcontractor should be allowed an additional 133 days to file suit after the automatic stay had been lifted.

> "[T]he intent of Sections 108(c)(1) and (2) seems to be to extend the period within which a creditor may act by the greater of (1) the period granted by a particular statutory scheme, (2) the period during which action has been stayed by the Bankruptcy Act, or (3) 30 days after notice of the termination of the stay."

Id. at 425.

Although no direct relief from the debtor-contractor was sought, the subcontractor in *Garbe* could not have commenced its suit to enforce its lien under Illinois law without joining the debtor-contractor as a party defendant. It is on this point that the *Garbe* decision is distinguishable. In Indiana it is not *necessary* for appellants to join the debtor-contractor in its foreclosure action.

> "In a proceeding against the owner by a subcontractor . . . to enforce his lien, the contractor is a proper party, but is not a necessary party."
>
> 19 I.L.E. *Mechanics' Liens* § 95 (1959);
>
> *see also: Hubbard et al. v. Moore* (1892), 132 Ind. 178, 31 N.E. 534.

Since Wright, the debtor-contractor, was not a necessary party to the foreclosure action, the appellants would not have violated the automatic stay by commencing their action to enforce their liens and therefore, the time period in IND. CODE § 32-8-3-6 was not tolled.

The two cases cited by appellants in support of their position can be differentiated. Although the debtor in *In re Barksdale* (Bankr. W.D. Vir. 1981) 15 B.R. 731, was not the owner of the real estate on which plaintiff filed its foreclosure action, the debtor had a *possessory interest* in the real estate and the provisions of the automatic stay

were broad enough to protect the debtor's interest. The creditor in *In Matter of S. I. Acquisition, Inc.* (5th Cir. 1978), 817 F.2d 1142, sought to pursue its claim against the debtor's parent corporation and principal, who was not in bankruptcy, in state court based on the theory of piercing the corporate veil. The court held that the creditor's state court cause of action based on alter ego allegations was automatically stayed upon the filing of S.I.A.'s bankruptcy petition for the following reasons:

> 1) the creditor's action is a right of action belonging to S.I.A. and, as such, is "property of the estate" within the meaning of section 541(a)(1);
>
> 2) the creditor's action would benefit all of S.I.A.'s creditors, but the creditor was proceeding alone, only for its benefit, without giving notice to other creditors of S.I.A.;
>
> 3) the creditor's action abridges the general policy of giving the debtor and its control person the opportunity to reorganize its finances; and
>
> 4) if one creditor is permitted to proceed outside of bankruptcy based upon alter ego, then all creditors of S.I.A. may do likewise resulting in a multi-jurisdictional rush to judgment that cuts against the fundamental policies of the Bankruptcy Code.

There is no possessory interest or alter ego in this case.

Appellants also claim that they would have run afoul of 11 U.S.C. § 362(a)(3) prohibiting any act to obtain possession of "property of the estate." The term "property of the estate" is defined in § 541 of the Bankruptcy Code:

> "(a) The Commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."
>
> 11 U.S.C. § 541(a)(1) (1990 Ed.).

The parties agree that there was a dispute as to whether the owner, Plymouth Plastics, had paid the debtor-contractor, Wright, approximately $57,000.00 due under its contract for labor and materials performed and furnished for the improvement of the owner's real estate. Appellants claim that they could not have proceeded with their foreclosure since the owner had funds allegedly due and owing the debtor-contractor which were property of the debtor's estate. It is clear that any sums due from the owner, Plymouth Plastics, to the debtor-contractor at the time of the petition were property of the estate as defined in 11 U.S.C. § 541(a)(1).

> *In re R.E. Tull & Sons, Inc.* (Bankr. D.Md. 1982), 25 B.R. 709, 710;
>
> *In the Matter of the Yobe Electric, Inc.* (Bankr. W.D.Pa. 1983), 30 B.R. 114, 118.

The *Tull* court acknowledged that the definition of property of estate enveloped receivables due to the debtor. The debtor has an equitable interest in funds due from the owner under a construction contract. *Id.* at 710. The *Tull* court disallowed any action by the creditor attempting to obtain funds owed to the debtor from the owner. The court reasoned that to allow the creditor to

proceed with its mechanic's lien action would be to permit it to prevail over all other unsecured creditors of the debtor.

In a similar case, *Yobe, supra,* the subcontractor had filed a mechanic's lien against the owner's property and was attempting to enforce it although the contractor was in bankruptcy. The debtor asserted that funds owed to it by the owner were property of the estate and thus, the subcontractor should not be allowed to pursue the owner in a state court action. In response the subcontractor argued that the mechanic's lien involved an *in rem* action against the real property of the owner and that it had not attempted to lien *any funds* in the hands of the owner. The court agreed and allowed the subcontractor to perfect its lien.

These cases differ in that the subcontractors in this case desire to enforce their liens since their liens have already been perfected. However the same reasoning is applicable. The subcontractors have mechanic's liens on the owner's *real estate,* not on *funds* in the owner's hands. For a subcontractor to pursue an owner's funds, it must file a notice to hold owner personally liable under IND. CODE § 32-8-3-9 (1988 Ed.) *See: Indianapolis Power & Light Co. v. Todd* (1985), Ind.App., 485 N.E.2d 632. There is no evidence that this was done or could have been done. The claims of the subcontractors are *in rem* and thus, did not involve property of the debtor's estate.

In conclusion, the subcontractors could have pursued the owner in state court despite the contractor's bankruptcy. The subcontractors were bound to file their foreclosure actions within one year as required by IND.

CODE § 32-8-3-6. This they did not do. The mechanic's liens are null and void. IND. CODE § 32-8-3-6.

Affirmed.

GARRARD, J., and BUCHANAN, J., CONCUR.

STATE OF INDIANA)
MARSHALL COUNTY) SS:

IN THE MARSHALL CIRCUIT COURT
CAUSE NO. 50C01-8706-CP-137

DELUXE SHEET METAL, INC.)
Plaintiff,)
v.)
PLYMOUTH PLASTICS, INC.)
Defendant.)

JUDGMENT

This cause came to be heard at the trial before the Court on March 28, 1989.

The Plaintiff appeared in Court by a representative and by Counsel, William Jonas. The Defendant, Plymouth Plastics, appeared in Court by a representative and by Counsel, Jere Humphrey.

Trial held and completed. Matter taken under advisement with Counsel allowed an opportunity to submit written closing arguments and additional pleadings.

The Court having reviewed the evidence and stipulations presented at the time of trial, the written closing arguments and proposed Findings submitted, and being duly advised in the premises, now enters the following Findings of Fact, Conclusions of Law, and Judgment:

1. That the Defendant, Plymouth Plastics, Inc. (hereinafter Defendant) is the owner of certain real property located in Marshall County.

2. That the Defendant entered into a contract with Roger L. Wright Construction Company, Inc., (hereinafter Wright) to erect a commercial building for the price of four hundred thirty-five thousand seven hundred thirty dollars ($435,730.00) on its Marshall County land.

3. That the contract between the Defendant and Wright did not contain a "No lien" provision.

4. That the Plaintiff, Deluxe Sheet Metal Company, Inc. hereinafter Plaintiff, was a subcontractor hired by Wright to perform labor and provide materials used in the construction of the commercial building at the above described premises.

5. That the Defendant paid Wright in full, for the work performed but Wright did not pay the Plaintiff, a subcontractor that Wright had hired.

6. That the value of the labor performed and the materials provided by Plaintiff at the Plymouth Plastics job is fifty-seven thousand six hundred sixty-two dollars ($57,662.00).

7. That on May 9, 1986 Wright filed a Chapter 11 Bankruptcy in the United States Bankruptcy Court for the Northern District of Indiana, South Bend Division, as Case Number 87-30603.

8. That the Plaintiff filed its Notice of Mechanics Lien in the office of the Marshall County Recorder on May 13, 1986, four (4) days after the filing of the bankruptcy by Wright.

9. That the Plaintiff had completed its work at the construction site of Defendant sometime after March 17,

1986 and thereby complied with the time requirements for filing Mechanics Liens.

10. That on June 7, 1986 Wright filed an adversary proceeding in the United States Bankruptcy Court, Northern District of Indiana, South Bend Division, as adversary proceeding number 86-3077. The Complaint which was amended on June 25, 1986 listed as Defendant's [sic], the Plaintiff, Deluxe Sheet Metal Company, Inc. the Defendant, Plymouth Plastics and Herrman & Goetz, Inc. (hereinafter Herrman). In the adversary proceeding, Wright sought to set aside the Mechanics liens filed by the Plaintiff herein and Herrman, and attempted to force the turnover of funds it claimed as due from Defendant, Plymouth Plastics.

11. That discovery was conducted in the bankruptcy proceedings and the parties to this litigation participated in that Discovery.

12. That the Plaintiff actively defended the validity of its Mechanics Lien in the adversary proceeding, both by answering and affirming the lien and by challenging Wright's standing to contest the validity of its Mechanics Lien.

13. That the adversary proceeding was subsequently dismissed by Order of the Bankruptcy Court on June 22, 1987.

14. That the Plaintiff filed this Complaint to foreclose the Mechanics Lien on June 23, 1987.

15. That the Defendant contends that the Notice of Mechanics Lien and the action on the Mechanics Lien is null and void as a result of the failure of the Plaintiffs to

comply with the one (1) year time requirement for filing its Complaint for Foreclosure, pursuant to I.C. 32-8-3-6.

16. That the Plaintiff contends it was stayed from filing its action to foreclose its Mechanics Lien by 11 U.S.C. Section 362(A)(3) and (6) and that therefore the one (1) year time requirement of I.C. 32-8-3-6 should be tolled or extended.

17. That the filing and perfection of the Mechanics Lien in Indiana are controlled by I.C. 32-8-3-3.

18. That the enforcement of the perfected lien is controlled by I.C. 32-8-3-6.

19. That the provisions of the Mechanics Lien Statutes are to be strictly construed.

20. That the one (1) year filing requirement of I.C. 32-8-3-6 was not tolled during the bankruptcy proceedings as contended by Plaintiff.

21. That the failure of the Plaintiff to comply with the one (1) year filing requirement of I.C. 32-8-3-6, makes the lien null and void.

22. That Judgment therefore, should be entered in favor of the Defendant, Plymouth Plastics, Inc. and against the Plaintiff, Deluxe Sheet Metal Co., Inc. upon their [sic] Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Plaintiff does not hold a valid Mechanics Lien on the Defendant's real property and that the same as filed on May 13, 1987, is deemed null and void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be, and is hereby entered in favor of the Defendant, Plymouth Plastics, Inc. and against the Plaintiff, Deluxe Sheet Metal Co., Inc. on Plaintiff's Complaint.

ALL OF WHICH IS ORDERED this 5th day of September, 1989.

/s/ Michael D. Cook
Judge Marshall Circuit Court

STATE OF INDIANA)
MARSHALL COUNTY) SS:

IN THE MARSHALL CIRCUIT COURT
CAUSE NO. 50C01-8706-CP-138

HERRMAN & GOETZ, INC.)
Plaintiff,)
v.)
PLYMOUTH PLASTICS, INC.)
Defendant.)

JUDGMENT

This cause came to be heard at trial before the Court on March 28, 1989.

The Plaintiff appeared in Court by a representative and by Counsel, William Jonas. The Defendant, Plymouth Plastics, appeared in Court by representative and by Counsel, Jere Humphrey.

Trial held and completed. Matter taken under advisement with Counsel allowed an opportunity to submit written closing arguments and additional pleadings.

The Court having reviewed the evidence and stipulations presented at the time of trial, the written closing arguments and proposed Findings submitted, and being duly advised in the premises, now enters the following Findings of Fact, Conclusions of Law, and Judgment:

1. That the Defendant, Plymouth Plastics, Inc., (hereinafter Defendant) is the owner of certain real property located in Marshall County.

2. That the Defendant entered into a contract with Roger L. Wright Construction Company, Inc., (hereinafter Wright) to erect a commercial building for the price of four hundred thirty-five thousand seven hundred thirty dollars ($435,730.00) on its Marshall County land.

3. That the contract between the Defendant and Wright did not contain a "No lien" provision.

4. That the Plaintiff, Herrman & Goetz, Inc. hereinafter Plaintiff, was subcontractor hired by Wright to perform labor and provide materials used in the construction of the commercial building at the above described premises.

5. That the Defendant paid Wright in full, for the work performed but Wright did not pay the Plaintiff, a subcontractor that Wright had hired.

6. That the value of the labor performed and the materials provided by Plaintiff at the Plymouth Plastics job is seventy-nine thousand six hundred dollars ($79,600.00).

7. That on May 9, 1986 Wright filed a Chapter 11 Bankruptcy in the United States Bankruptcy Court for the Northern District of Indiana, South Bend Division, as Case Number 87-30603.

8. That the Plaintiff filed its Notice of Mechanics Lien in the office of the Marshall County Recorder on May 13, 1986, four (4) days after the filing of the bankruptcy by Wright.

9. That the Plaintiff had performed work at the construction of the building on Plaintiff's property by setting fixtures in the office bathrooms March 14, and

March 17, 1986 and completing the thermostat for the heating system March 18th, 1986 thereby complying with the time requirements for filing Mechanics Liens.

10. That on June 7, 1986 Wright filed an adversary proceeding in the United States Bankruptcy Court, Northern District of Indiana, South Bend Division, as adversary proceeding number 86-3077. The Complaint which was amended on June 25, 1986 listed as Defendant's [sic], the Plaintiff, Deluxe Sheet Metal Company, Inc. the Defendant, Plymouth Plastics and Herrman & Goetz, Inc. (hereinafter Herrman) [sic]. In the adversary proceeding, Wright sought to set aside the Mechanics liens filed by the Plaintiff herein and Herrman, and attempted to force the turnover of funds it claimed as due from Defendant, Plymouth Plastics.

11. That Discovery was conducted in the Bankruptcy proceedings and the parties to this litigation participated in that Discovery.

12. That the Plaintiff actively defended the validity of its Mechanics Lien in the adversary proceeding, both by answering and affirming the lien and by challenging Wright's standing to contest the validity of its Mechanics Lien.

13. That the adversary proceeding was subsequently dismissed by Order of the Bankruptcy Court on June 22, 1987.

14. That the Plaintiff filed this Complaint to foreclose the Mechanics Lien on June 23, 1987.

15. That the Defendant contends that the Notice of Mechanics Lien and the action on the Mechanics Lien is

null and void as a result of the failure of the Plaintiffs to comply with the one (1) year time requirement for filing its Complaint for Foreclosure, pursuant to I.C. 32-8-3-6.

16. That the Plaintiff contends it was stayed from filing its action to foreclose its Mechanics Lien by 11, U.S.C. Section 362(A)(3) and (6) and that therefore the one (1) year time requirement of I.C. 32-8-3-6 should be tolled or extended.

17. That the filing and perfection of the Mechanics Lien in Indiana are controlled by I.C. 32-8-3-3.

18. That the enforcement of the perfected lien is controlled by I.C. 32-8-3-6.

19. That the provisions of the Mechanics Lien Statutes are to be strictly construed.

20. That the one (1) year filing requirement of I.C. 32-8-3-6 was not tolled during the bankruptcy proceedings as contended by Plaintiff.

21. That the failure of the Plaintiff to comply with the one (1) year filing requirement of I.C. 32-8-3-6, makes the lien null and void.

22. That judgment therefore, should be entered in favor of the Defendant, Plymouth Plastics, Inc. and against the Plaintiff, Herrman & Goetz, Inc. upon their [sic] Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Plaintiff does not hold a valid Mechanics Lien on the Defendant's real property and that the same is filed on May 13, 1987, is deemed null and void.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby entered in favor of the Defendant, Plymouth Plastics, Inc. and against the Plaintiff, Herrman & Goetz, Inc. on Plaintiff's Complaint.

ALL OF WHICH IS ORDERED this 5th day of September, 1989.

/s/ Michael D. Cook
Judge Marshall Circuit Court

Supreme Court, U.S.
FILED
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No. 90-1907

In The

Supreme Court of the United States

October Term, 1991

DELUXE SHEET METAL, INC.;
HERRMAN & GOETZ, INC.,

Petitioners,

v.

PLYMOUTH PLASTICS, INC.,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Indiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Indiana Mechanic's Lien Statute which grants to subcontractors an *in rem* action against a non-debtor owner's real estate is in conflict with an order of stay in a general contractor's bankruptcy.

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STATEMENT OF THE CASE

A. FACTS

Appellee acknowledges that Appellants' Statement of the Case is substantially correct. A significant additional fact is that the parties stipulated "that Defendant Plymouth Plastics, Inc., has paid in full the contract amount due from it to Roger L. Wright Construction Company, Inc." (D.R. 102 and 125)

B. INDIANA STATUTORY BACKGROUND

In this portion of the brief Appellants state "the doctrine of relation back is critical because it is this feature which triggers the exception to the automatic stay. . . . " Appellees takes issue with that statement. Since the property of the debtor was never implicated, Appellants did not need the exception to the automatic stay in order to perfect. No exception was necessary because no property of the debtor was implicated and therefore the automatic stay itself did not apply.

C. PRIOR PROCEEDINGS IN THE INDIANA COURTS

This section contains an inadvertent misstatement. Wright Construction Company did not move to dismiss the actions; Plymouth Plastics, Inc., moved to dismiss the actions.

SUMMARY ARGUMENT

Since the Indiana Mechanic's Lien law does not require the joinder of the general contractor in a foreclosure suit against the real estate of a third party owner, there is no violation of 11 U.S.C. Sec. 362 (a)(1) when the subcontractor forecloses against the real estate in an *in rem* proceeding. Moreover, sections 362(a)(3)(4) and (6) are not violated because no property of the bankrupt's estate is implicated in the foreclosure.

Further, the cases cited by Appellants to support their position are easily distinguished. First, in some of the cases cited, the property foreclosed on was the debtor's property and not some third party. In other cases, the mechanic's lien statutes being interpreted were unlike Indiana's in that those statutes gave a lien on funds in the hands of the third party owner still owing to the debtor. Also, other cases relied upon by the debtor had a possessory interest in the real estate being foreclosed upon and thus the debtor's property was involved.

Finally, Appellants' argument that the owner and general contractor are intertwined is not supported by any authority. While the intertwining concept exists in the law, no facts support the application of it to this case, and the attempt by Appellants to do so stretches the law far beyond the cited cases.

ARGUMENT

I. THE FACTS OF THIS CASE MAKE IT A POOR CASE FOR ANY CERTIORARI CONSIDERATION. MOREOVER, NO CONFLICT EXISTS BETWEEN THE INDIANA DECISION AND FEDERAL AUTHORITY.

Contrary to Appellants' assertion, the facts of this case make it a bad case to decide issues as sweeping as Appellants claim. Appellants attempt to tag on to the following cases: *Valley Transit Mix of Ruidoso, Inc. v. Miller,* 928 F.2d 354 (10th Cir. 1991); *Garbe Iron Works v. Priester,* 99 Ill. 2d 84, 76 Ill. Dec. 428, 457 N.E.2d 422 (1983); *In Re: Hunter's Run Limited Partnership,* 875 F.2d 1425 (9th Cir. 1989); *In Re: 48th St. Steakhouse, Inc.,* 835 F.2d 427 (2nd Cir. 1987), *Cert. denied* 45 U.S. 1035, 108 S.Ct. 1596, 99 L.Ed.2d 910; *A.H. Robbins Company, Inc. v. Piccinin,* 788 F.2d 994 (4th Cir. 1986). Yet, this case is not factually similar to those cases. For example, two of those cases *Valley Transit-Mix* and *In Re: 48th St. Steakhouse, Inc.,* turn on the fact that the debtor had a leasehold interest in the property and therefore the property of the debtor was implicated because of the lease. There is no lease here. The Indiana Appellate Court was willing to recognize that a possessory interest of a debtor implicated the property as property of the debtor's estate:

> Although the debtor in *In Re: Barksdale* (Bankr. W.D. Vir. 1981) 15 B.R. 731, was not the owner of the real estate on which Plaintiff filed its foreclosure action, the debtor had a *possessory interest* in the real estate and the provisions of the automatic stay were broad enough to protect the debtor's interest. *Deluxe Sheet Metal, Inc., and Herrman & Goetz, Inc. v. Plymouth Plastics, Inc.*

(1990), 555 N.E.2d 1297, 1299. (Emphasis original)

Further, in *In Re: Hunter's Run Limited Partnership,* labor and materials were furnished to certain real property of the debtor. When the debtor's property has received the improvements, of course the debtor's property is implicated, and the automatic stay applies. The instant case concerns real property of a third party, not the debtor, and is therefore easily distinguished.

The case of *A.H. Robbins* is totally inapplicable. Apparently it is cited to support Appellants' theory of intertwining in order to stretch the argument to cover assets of non-debtors. However, in all of the intertwining cases there was a relationship independent of the action involved in the bankruptcy. In *A.H. Robbins,* the third party was a guarantor. Here, the third party landowner had no relationship, and thus no intertwining, with the general contractor. Hiring the general contractor to build the building is not an intertwining as defined by the federal courts. In *A.H. Robbins* the Court cited with approval the case of *Johns-Manville Sales Corporation,* 26 B.R. 405, 410 (S.D.N.Y. 1983) which cited the frequently cited case of *Royal Trucks and Trailer v. Armadors Meritina Salvadoreana,* 10 B.R. 488, 491 (N.D. Ill. 1981):

> . . . "[T]here are cases [under 362 (a)1] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants" but, it adds, that in order for relief for such non-bankrupt defendants to be available under (a)1 there must be "unusual circumstances" and certainly "something more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 Bankruptcy must be shown in order

> that proceedings be stayed against non-bankrupt parties". *A.H. Robbins Company, Inc.* at 999.

The Court then goes on to define this "unusual situation" as follows:

> This "unusual situation", it would seem arises when there is such identity between the debtor and the third party defendant that the debtor may be said to be the real party defendant and that a judgment against the third party defendant will in effect be a judgment or finding against the debtor. *Id.*

All we have in this case is a landowner hiring a general contractor to build a building. Appellants have wrenched the concept of intertwining interests far beyond its original concept. It does this by stating at page 17 of its petition:

> The intertwining of interest is obvious. It results from the derivative nature of the subcontractor's claim against the owner and the owner's right either to indemnification from the general contractor if he has to pay twice for the same work in order to satisfy a mechanic's lien or to set off against any amount which owner still owes the debtor/general contractor. Either action would affect the amount of money available in the bankruptcy estate for the general contractor's creditors. *Id.*

The premise and conclusion of this thought are not totally correct. While there need not be privity between the owner and the subcontractor, derivative is not a good word to describe the subcontractor's right of action against the owner. If it were, then the fact that the owner had paid the general contractor would defeat the subcontractor's right of action, but Indiana law allows a

subcontractor an independent right of action even though a general has been paid:

> The statute gives the subcontractor an absolute lien, not effective by the mere failure of the principal contractor to perform his contract, or by the cancellation or recision thereof, or by the removal of the work, or payment of the principal contractor. 19 I.L.E. *Mechanics' Liens* Sec. 32 (1959).

Further, Congress by enacting § 553 of the bankruptcy code granted to third parties the right of set-off against the debtor. Does this mean that by paying a subcontractor and then exercising a right of set-off, that an owner has either violated the stay or has become intertwined to such an extent that the identity of the debtor and third party are one and the same? No case has even come close to such a position. However, in the case of *Yobe Electric, Inc. v. Graybar Electric Company,* 30 B.R. 114 (Bkrtcy. W.D. P.A. 1983) the bankruptcy court recognized that certain sections of the bankruptcy code may impinge on other sections:

> While the Court realizes that the Owner's withholding of funds may have a deleterious effect upon Debtor's efforts to reorganize, it cannot deprive the sub-contractor of its clear right under state law, as protected by § 546(b) of the Bankruptcy Code. *Id.* at 119.

Because the Indiana Legislature has chosen to protect subcontractors by giving them a right directly against the property of the owners, that statutory right does not mean that the owner is now intertwined with the general contractor.

Appellants cite an Illinois Supreme Court case *Garbe Iron Works* and state that this court should intervene because of the split of authority between *Garbe* and this case. Illinois has a mechanics lien law different from Indiana. How can there be a split of authority when each state is allowed to interpret its own mechanics lien statute? Kentucky it seems also distinguishes *Garbe* in the same way Indiana does:

> *Garbe,* however, is clearly distinguishable in that Illinois Law required that suit could not be instituted against the surety without joining the principal. That is simply not the law in Kentucky. *Cumberland Metals, Inc. v. Kentucky Insurance Guaranty Association,* Ky. App. 801 S.W.2d 339 (1990).

In a further attempt to persuade this Court, Appellants on page 16 of their petition cite eight cases which they say support their position. None does. The cases of *Matter of Fiorillo,* 19 B.R. 21 (Bankr. S.D. NY. 1982) and *In Re: Houts,* 23 B.R. 705 (Bankr. M.D. MO. 1982) and *In Re: Hunter's Run Limited Partnership* dealt with mechanics liens on property owned by the debtor. In *In Re: Nash Phillips/Copus, Inc.,* 78 B.R. 798 (W.D. Tex. 1987) the subcontractor sued the debtor corporation in State court as part of the mechanics lien foreclosure process, unlike Indiana law where the debtor need not be joined. *In Re: Tull and Sons, Inc.,* 25 B.R. 709 (Bkrtcy. D. Md. 1982) concerned "funds in the hands of an owner which funds were contractually due to the debtor" *Id.* at 710. The Indiana Court of Appeals correctly distinguished the cases of *In Re: Tull* and *Yobe Electric, Inc. v. Graybar Electric Company,* 30 B.R. 14 (Bkrtcy. PA. 1983) and noted that *Yobe* is in agreement with Indiana law stating:

> In response the subcontractor argued that the mechanic's lien involved in *in rem* action against the real property of the owner and that it had not attempted to lien *any funds* in the hands of the owner. *Deluxe Sheet Metal, Inc. and Herrman & Goetz, Inc. v. Plymouth Plastics, Inc.*, (1990), Ind.App., 555 N.E.2d 1296 at 1300. (Emphasis original)

The case of *In Re: APC Construction, Inc.*, 112 B.R. 89 (Bkrtcy. D. VT. 1990) turned on the interpretation of the Vermont mechanic's lien law which is different from Indiana because:

> Under Vermont Law a subcontractor is entitled to a contractor's lien only to the extent any monies are owed from the owner to the general contractor. *Id.* at 100.

The Indiana Court of Appeals correctly explained the Indiana statute:

> The subcontractors have mechanic's liens on the owner's *real estate*, not on funds in the owner's hands. *Deluxe Sheet Metal* at 1300.

Concerning the case of *In Re: Birdview Satellite Communications*, 90 B.R. 465 (Bkrtcy. Kan. 1988) it is difficult to see how it supports Plaintiff's position. The case turned on the Kansas Mechanic's Lien law, and the Court concluded that since the claimant did not commence suit within one (1) year, the Trustee could avoid the lien.

Finally, the stipulation entered into between the parties that the amount owing from the owner to the debtor had been paid in full is a recognition that no property of the debtor was implicated and is further grounds for denying Appellants' petition.

CONCLUSION

The provisions of Section 362 are directed toward prohibiting actions against the debtor or the debtor's estate. The Indiana Mechanic's Lien Statute gives to subcontractors an *in rem* action against the owner's real estate, not funds due and owing to the general contractor. Moreover, the law of intertwining relationships has never been stretched to cover a situation where the only relationship between the owner and the debtor was the construction project in issue. Also, payment in full by the owner to the debtor precludes any possible argument claiming that a property interest of the debtor is implicated.

Respectfully submitted,

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